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6 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
7 AT TACOMA

8 RICHARD SMITH,

9 Plaintiff,

10 v.

11 ARDEW WOOD PRODUCTS, LTD., a British
Columbia, Canada corporation

12 Defendant..

Case No. C07-5641 FDB

ORDER GRANTING PLAINTIFF'S
MOTION FOR PROTECTIVE
ORDER RE: MEDICAL EXPERT
FEES

13 This matter comes before the Court on Plaintiff Richard Smith's motion for a protective
14 order. Specifically, Plaintiff moves to preclude Defendant's medical expert witness, Dr. Michael
15 Battaglia from requiring Plaintiff to submit a \$3,000.00 pre-payment before agreeing to schedule a
16 deposition and billing Plaintiff \$1,500.00 per hour for deposition testimony. The Court, having
17 reviewed the motion and the remaining record, is fully informed and hereby grants the motion for
18 the reasons that follow.

19 **Introduction and Background**

20 This lawsuit arises from a vehicle overturn accident at the APM Terminal at the Port of
21 Tacoma. At the time of the accident, Plaintiff was working as a longshoreman, operating a hustler
22 with an attached trailer, on which a container of lumber was loaded. Plaintiff alleges that the cargo
23 shifting within the container caused the container and hustler to overturn. Plaintiff claims that
24 Defendant Ardew Wood Products, Ltd (Ardew) improperly loaded the container by not providing
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1 shoring, and that he suffered injury as a result. Ardew denies these claims.

2 On April 30, 2009, Defendant's medical expert, Dr. Battaglia evaluated Plaintiff and
3 subsequently prepared a report. Plaintiff sought to depose Dr. Battaglia regarding his medical
4 findings and opinion. Plaintiff was informed that Dr. Battaglia required a \$3,000.00 prepayment
5 prior to scheduling his deposition and that his hour fee for deposition testimony is \$1,500.00.

6 The Plaintiff's three medical witness are treating physician Dr. Robert Kunkle, Dr. H.
7 Richard Johnson, and Dr. Jonathan Ritson. The hourly costs for Plaintiff's respective medical
8 witnesses range between \$700.00 and \$750.00 per hour.

9 Plaintiff asserts that Dr. Battaglia's billing rate of \$1,500.00 per hour and \$3,000.00 deposit
10 poses an undue expense on Plaintiff and should be reduced so as to be comparable to other medical
11 experts involved in this litigation. The Defendant has not filed a response to the motion.

12 **Entitlement to Reasonable Expert Witness Fees**

13 Rule 26(b)(4)(C) of the Federal Rules of Civil Procedure provides that "the court shall
14 require that the party seeking discovery pay the expert a reasonable fee for time spent in responding
15 to discovery," unless manifest injustice would result. See Fed. R. Civ. P. 24(b)(4)(C). What
16 constitutes a "reasonable fee" for an expert witness at deposition lies within the court's sound
17 discretion. Edin v. The Paul Revere Life Ins. Co., 188 F.R.D. 543, 545 (D. Ariz. 1999).

18 In determining a reasonable fee for an expert under Rule 24(b)(4)(C), several factors may be
19 relevant: (1) the witness' area of expertise; (2) the education and training required to provide the
20 expert insight that is sought; (3) the prevailing rates of other comparably respected available
21 experts; (4) the nature, quality and complexity of the discovery responses provided; (5) the fee
22 actually being charged to the party who retained the expert; (6) fees traditionally charged by the
23 expert on related matters; and (6) any other factor likely to be of assistance to the court in balancing
24 the interests implicated by Rule 26. See U.S. Energy Corp. v. Nukem, Inc., 163 F.R.D. 344, 345-46
25 (D. Colo. 1995). See also Mathis v. NYNEX, 165 F.R.D. 23, 24-25 (E.D. N.Y. 1996); Jochims v.

1 Isuzu Motors, Ltd., 141 F.R.D. 493, 496 (S.D. Iowa 1992). The court must assure that there is
2 some reasonable relationship between services rendered by the expert responding to discovery and
3 the remuneration to which the expert is entitled. Grady v. Jefferson County Bd. of County Com's,
4 249 F.R.D. 657, 662 (D. Colo. 2008).

5 After analyzing the relevant factors, the Court concludes that Dr. Battaglia's deposition fees
6 are unreasonably high. Initially, the Court notes that Dr. Battaglia is unquestionably a highly
7 skilled and knowledgeable expert witness as he is a board-certified orthopedic surgeon. The third
8 factor, however, the prevailing rates of other comparably respected available experts, troubles the
9 Court.

10 In this case, Plaintiff has shown that his three medical witnesses are comparable to Dr.
11 Battaglia in the area of expertise: general orthopedics and orthopedic surgery. Nonetheless,
12 Plaintiff's experts charge a fee half that of Dr. Battaglia. The Defendant, not having responded to
13 this motion, has provided nothing about Dr. Battaglia's expertise or proposed deposition testimony
14 that would justify such a disparity in fees.

15 Under these circumstances the Court must be guided by the limited information in the
16 record. "[W]hile a party may contract with any expert it chooses, the court will not automatically
17 tax the opposing party with any unreasonable fees charged by the expert." Grady v. Jefferson
18 County Bd. of County Com's, 249 F.R.D. 657, 662 (D. Colo. 2008)(expert medical witness fee of
19 \$2,000 per hour reduced to reasonable fee of \$600 per hour). See also Young v. Global 3, Inc., 2005
20 WL 1423594 (D. Colo. May 26, 2005).(expert medical physician witness's fee of \$1,200.00 per
21 hour for deposition testimony reduced to reasonable fee of \$500.00 per hour.).

22 Although it is stated in the record that Dr. Battaglia 's requested deposition fees exceed the
23 amount Dr. Battaglia charged Defendant for Plaintiff's examination, there is no information as to
24 the amount actually charged to the Defendant for retaining Dr. Battaglia, or the amounts Dr.
25 Battaglia charges on related matters. As to the nature, quality and complexity of the discovery that

1 will be provided by Dr. Battaglia in deposition, nothing is revealed in the record.

2 In the absence of any persuasive support offered by Defendant, the Court must conclude that
3 the deposition hourly rate of \$1,500.00 and the pre-scheduling fee of \$3,000.00 is excessive and
4 unreasonable. A reasonable hourly rate of compensation for Dr. Battaglia's deposition is \$750.00.

5 **Conclusion**


6 Accordingly, for the forgoing reasons, Plaintiff's motion for a protective order to prohibit
7 excessive expert medical witness fees is granted. The Court finds that a reasonable hourly rate for
8 Dr. Battaglia's deposition is \$750.00.

9 ACCORDINGLY;

10 IT IS ORDERED:

- 11 (1) Plaintiff's Motion for Protective Order Re: Defendant's Medical Expert's
12 Unreasonable Fees [Dkt. # 108] is **GRANTED**. Plaintiff shall not be required to pay
13 \$3,000.00 prior to the scheduling of Dr. Battaglia's deposition. Further, the
14 reasonable hourly fee for Dr. Battaglia's deposition shall be \$750.00 per hour.
- 15 (2) Dr. Battaglia shall make himself available to be deposed by Plaintiff before the July
16 24, 2009 discovery cut-off, or as soon thereafter as is practical. If necessary, the
17 discovery cut-off date shall be extended to the extent reasonably necessary to obtain
18 the deposition of Dr. Battaglia.

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20 DATED this 20th day of July, 2009.

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25 FRANKLIN D. BURGESS
UNITED STATES DISTRICT JUDGE

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